In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-693

VIRGINIA J. MARCH, JOHN H. LEHR, ARTHUR TINGLEY, LUCY I. F. JOHNSON, ELIZABETH A. MESSMER, MARY ALICE REKUCKI, and JOHN MORRISON, on behalf of themselves and all others similarly situated, *Petitioners*,

vs.

THE UNITED STATES, *Respondent*,

EARL C. BERGER, *Petitioner*,

vs.

THE UNITED STATES, *Respondent*.

REPLY BY PETITIONERS TO OPPOSITION OF RESPONDENT TO PETITION FOR A WRIT OF CERTIORARI

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Opposition was interposed by Respondent, The United States, to the Petition for a Writ of Certiorari to the United States Court of Appeals (for the District of Columbia Circuit) on the sole ground that the Petition was allegedly filed one (1) day late. That Opposition does not comment on the merits.

I

It is respectfully submitted that the Petition was timely filed within the usual 90 day period, because:

The Court of Appeals' Order of August 18, 1976 which denies petitioners' Motion for reconsideration and a hearing was not docketed in the district court until the next day, August 19, 1976.[1] Therefore computation of the 90 day period would commence the day after, on August 20, 1976, and thus within the 90 day period.

II

The interlocutory judgment on remand (App. A, Petn.,p.1a-12a) did not comply with the original opinion and decision of the Court of Appeals (App. id., B, pp.13a-37a) in that, among other things, it limited damages to $10,000 per individual (there are an estimated 19,500 individual class plaintiffs) in spite of the fact that after action was commenced on November 20, 1970, additional damages accrued per individual during the 4 years consumed in obtaining the original decision on appeal for back-pay under P.L. 86-91(1959) as amended by P.L. 89-391 effective April 14, 1966.

The prior decision on appeal, of November 12, 1974 (App. B, to Ptn.) provides that:

> "IV. THE TEACHERS' RIGHTS TO DAMAGES
>
> "As we noted above, the District Court found the Department's practices inconsistent with the

[1]Please see Exhibit 1 annexed to Motion (January 1977) to resolve the issue of timely filing.

> statutory scheme in one respect. The court granted the teachers injunctive relief on that count, but denied their claim for back pay damages.
>
> The trial court gave no reason for denying the teachers' prayer for damages, and we are unable to discern any sound reason to support the denial. The teachers had a statutory right to receive the pay they now demand as damages. As a direct result of the Department's erroneous interpretation and application of the Act, they have suffered a recognizable legal injury. In addition to an injunction against the condemned practices, they should receive what has been rightfully and legally theirs since April 14, 1966. As the Supreme Court has declared, '(a) disregard of the command of the statute is a wrongful act, and where it results in damage to one of a class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied'."
>
> . . . . "We hope this decision will finally resolve a dispute that has already lasted far too long." (remanded)
>
> 506 F.2d 1306, 1320.

That decision does not limit petitioners' actual damages. It mandates that "They should receive what has been rightfully and legally theirs since April 14, 1966." This can only mean *all* of their damages including damages that accrued pending suit, all damages suffered since April 14, 1966. Because the remand court limited actual damages petitioners returned to the Court of Appeals.

III

It is respectfully submitted that when the petitioners again appealed that suspended the trial court's jurisdiction to do anything. Therefore until the Court of Appeals order of August 18, 1976 was docketed in the trial court on August 19, 1976, the computation of time commenced the next day, August 20, 1976, within which to institute further proceedings in the Supreme Court per S.C. Rule 34 (1) which in pertinent part provides:

> "1. In computing any period of time prescribed or allowed by these rules, by order of court, *or by any applicable statute,* the day of the act, event, or default after which the designated period of time begins to run is not to be included . . ." (emphasis supplied)

IV

Petitioners suggest, arguendo, without conceding the alleged one (1) day late factor, nevertheless this Court can, and often does, relax procedural rules in the exercise of its discretion when the ends of justice so require. Note that Rule 34, S.C., supra, refers to *applicable statutes* as well as S.C. Rules. In *Schact v. United States,* 398 U.S. 58, 64 this Court ruled:

> "The procedural rules adopted by this Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion when the ends of justice so require."

As noted in the Petition for a Writ and in the Motion of Petitioners (January 1977) to resolve the matter of timely filing, it is clearly demonstrated that a very special and extraordinary situation developed which calls for the exercise of this Court's discretion to waive the alleged one (1) day late factor, if indeed filing occured one day late, which we submit is not so. Certainly no prejudice can be suffered by the Respondent who has ill treated its teacher employees for more than a decade while stubbornly refusing to honor the clear statutory mandate of Congress. During these many years the Respondent has profited at the expense of the teachers, using their money without interest.

Whatever back pay dollars the teachers realize ultimately are worth considerably less, because of the effects of ongoing inflation. A dollar is no longer a real dollar; the teachers are fully entitled to every such depreciated dollar.

V

In the interest of brevity petitioners respectfully refer this Court to the very exceptional reasons why it should exercise its discretion in the premises, as outlined in petitioners' Motion of this month concerning timeliness. Because of the sudden, unforeseen dire emergency that enveloped petitioners' attorney, Mr. Berger, just as he was about to complete the Petition and ready it for printing and filing. He was duty bound to come to the assistance of his sister, Mrs. Douglas. Mr. Berger is the only surviving male rela-

tive in his family, and thus was deterred for a whole month (October 13 to November 14, 1976) from completing and filing that Petition.

Mr. Berger had to abandon his professional duties, immediately fly to New York from California to arrange his sister's surgery, for special intensive care nurses around the clock, for oxygen tanks, etcetera, and then also make funeral arrangements, after which only to discover that his sister's apartment had been burglarized, involving missing records which had to be reconstructed from the debris in his blind sister's apartment, burglarized while his sister was dying in a hospital; and then Mr. Berger also had to attend to bills incurred during his sister's last illness.

It may also be noted that Mr. Berger, himself, is a cardiac subject, having had open heart surgery and is required to observe a conservative program as far as possible. He is 71 years old; never before in his 48 years of practice has he ever been late in filing any pleading—never.

VI.

Again, in the interest of brevity, reference is made to the matters set forth in the Petition itself and also the current Motion concerning timeliness.

The law firm of Cole & Groner, Esquires, who also present Opposition, is without standing. That law firm was formerly engaged by Mr. Berger to assist him and advocate the teachers' rights, only because Mr. Berger was not a resident practitioner in the District of Columbia, and so is shown as Of Counsel.

Cole & Groner did cooperate up to and only until the favorable Court of Appeals' decision came down November 12, 1974; immediately thereafter, after that decision became nonappealable Cole & Groner changed over to the other side of the same case, and gratuitously, without authority, joined the forces of the Respondent to the distinct prejudice of their former *cestuis*.

In any event, the Cole & Groner "Opposition" completely fails to discuss the real merits of the Petition, and adopts the Government's alleged one day late premise. Although the Petition points out that Cole & Groner are without standing, they elect not to meet that issue in their Opposition. Indeed a strange happening—where attorneys abandon their cestuis and further attempt to effect a distinct loss on those cestuis.

CONCLUSION

For the reasons herein noted, as well as the reason set out in petitioners' Motion concerning timeliness (January 1977), it is respectfully prayed that this Court grant certiorari and permit a proper review on the merits.

Respectfully submitted,

EARL C. BERGER
Attorney for Petitioners

JOHN W. BERGEN
Of Counsel

January, 1977.